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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

WAN SHIH HSIEH,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Wan Shih Hsieh prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit holding, in part, that the Immigration and Naturalization Service of the United States Department of Justice has no legal duty to respond to inquiries made to it from consular officials of the United States Department of State.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-12a), is reported at 569 F.2d 1179. The opinion of the District Court (App. B, *infra*, pp. 13a-29a) is not reported.

Jurisdiction

The judgment of the Court of Appeals (App. C, *infra*, pp. 30a-31a) was entered on January 12, 1978. A timely peti-

tion for rehearing with a suggestion for rehearing *en banc* was denied on February 26, 1978 (App. D, *infra,* pp. 32a-33a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

Whether the statutory scheme of the Immigration and Nationality Act and its mandate, 8 U.S.C. § 1105, requires the Immigration and Naturalization Service of the Department of Justice to respond to inquiries of United States Consulates relating to the issuance of visas abroad.

Whether the holding of the Court of Appeals that the Immigration and Naturalization Service of the Department of Justice does not have to respond to any inquiry from a consulate abroad, contrary to the express statutory mandate of 8 U.S.C. § 1105, portends the dismantling of the entire statutory scheme enacted by Congress for the lawful immigration to this country of aliens.

Whether the Immigration and Naturalization Service acted reasonably as a matter of law in failing to respond to inquiries of a United States Consulate, thereby preventing the immigration of petitioner's children.

Statutes, Federal Rules and Regulations Involved

The pertinent portions of Sections 101, 103, 104 and 105 of the Immigration and Nationality Act (8 U.S.C. §§ 1101, 1103, 1104, and 1105), Rule 12(b) of the Federal Rules of Civil Procedure, 8 C.F.R. § 204.3 and 22 C.F.R. § 42.42 are set forth in the appendix (App. E, *infra,* pp. 34a-41a).

Statement

This is a suit seeking mandatory injunctive relief against officials of the New York District Office of the Immigration

and Naturalization Service requiring the Service to respond to inquiries of a United States Consulate abroad to enable petitioner's fatherless children to immigrate to the United States.

Petitioner Wan Shih Hsieh, a native and citizen of Taiwan, Republic of China, first entered the United States on September 20, 1966, as a nonimmigrant employee of a United Nations official. Her husband and three children remained in Taiwan.

Hsieh was granted an adjustment of status to permanent resident alien in the United States on November 9, 1973, pursuant to Section 245 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1255. She met the statutory requirements for such adjustment of status as the beneficiary of an approved sixth preference visa petition, which was based upon a labor certification issued by the Secretary of Labor pursuant to Section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14).

In particular, the application for labor certification was filed in Hsieh's behalf by the Hsin Hsin Chinese Restaurant in Brooklyn, New York.[1]

On April 11, 1973, a labor certification was issued to petitioner Hsieh, and on April 30, 1973, the restaurant filed a petition with the Service to qualify Hsieh as a sixth perference immigrant pursuant to Section 203(a)(6) of the Act, based on her approved labor certification. The visa petition was approved on August 9, 1973, and on August 24, 1973, Hsieh accordingly submitted an application for

[1] The application stated that Hsieh would be employed as a Chinese specialty chef, and included as evidence of her qualifications a certificate of employment signed by Chien Ching Tsui, which stated that Hsieh had been employed in his restaurant, the Kwok Kong, in Taipei City, Taiwan, as a chef from March 1959 through 1965.

adjustment of status to permanent resident, which application was approved on November 4, 1973, as noted above.

Subsequent thereto, Hsieh filed visa petitions on behalf of her three children in Taiwan, to accord them second preference status for the issuance of immigrant visas pursuant to Section 203(a) (2) of the Act, 8 U.S.C. § 1153(a)(2), thereby enabling them to join her in the United States. According to Form I-171 sent to Hsieh by the INS, the preference petitions were approved on April 9, 1975, and the approved applications forwarded to the American Consulate in Taiwan.

On July 15, 1975, Hsieh wrote to the United States Embassy in Taipei, Taiwan, requesting that immigrant visas be issued to her children. Pursuant to an inquiry of July 28, 1975 from the American Embassy in Taipei, requesting that second preference visa petitions be filed, Hsieh informed the consul by letter dated December 19, 1975, that such petitions for second preference classification had indeed been previously filed with the INS, approved on April 9, 1975, and previously forwarded to Taiwan by the Service.

On January 27, 1976, Hsieh again wrote to the American Embassy in Taiwan, through her attorney, requesting information as to why there had been such a delay in the issuance of visas to her children. The letter was returned from the American Embassy in Taipei, with a notation by the Embassy stating that Hsieh's labor certification and tax forms for 1974 and 1975 would be required in order to continue processing the case. On March 2, 1976, Hsieh responded, stating that the Immigration and Naturalization Service was in possession of her original labor certification, and that her 1975 tax forms had not been prepared, but submitting her 1974 tax forms. That letter (of March 2,

1976) was returned to Hsieh, with a statement from the American Consul, John J. Tkacik, Jr., dated March 15, 1976, stating as follows:

> "We have reviewed Mrs. HSIEH (CHANG) Wan-shih's case and have referred it to the Travel Control branch of the Immigration and Naturalization Service Office in New York. We regret that we are unable to approve the immigrant visa applications for Mrs. HSIEH's children until the INS has reviewed her case and advised us whether she continues to remain eligible for permanent resident status. When the INS replies to our memoranda of July 31, 1975 and March 15, 1976 we will process the visa applications for her children accordingly."

On May 19, 1976, Hsieh wrote to the Service asking the agency to please respond to the letter of the American Consulate in Taiwan. No response was received to that letter, so Hsieh sent a second letter to the attention of Mr. Maurice Kiley, the District Director of the Immigration and Naturalization Service in New York on July 13, 1976, requesting that the Service respond to the inquiry from the American Embassy in Taiwan.

Although unknown at that time to Hsieh, by memorandum dated July 31, 1975, the American Consul in Taipei, Taiwan, had apparently advised the Service that it was desirous of further verification of Hsieh's experience as a cook at the Kwok Kong Restaurant (based upon which her original labor certification was granted), as this was not listed in her household register, a record primarily indicating the family status for each member of a household, but maintaining some often inaccurate notes on education and occupation.[2] Apparently, the household register also in-

[2] An INS Form G-600A, "Investigation Control Card" indicates that the request was received by the INS on September 15, 1975 and assigned to the "Fraud" Section.

dicated that Hsieh and her husband had moved to the United States in 1970, which was an obvious inaccuracy, as her husband died in Taiwan after petitioner had immigrated alone to the United States. The Embassy requested the Service "to forward copies of the Subject's original adjustment application and some documentation of her previous G-4 status. . . ."

On March 12, 1976, Hsieh's oldest son, Chang Yu-nien, who was then 25 years old, and barely literate in Chinese, and at the time of Hsieh's departure from Taiwan in 1966 had been 15 years old, allegedly executed a statement, at the American Consulate in Taiwan, later rescinded, stating that between 1954 and 1966, when he was a child of between 3 years and 15 years old, his mother had supported the family in Taiwan as a pedicab driver and part-time Amah.[3]

The Consulate then sent a second request to the INS, dated March 15, 1976, informing the Service of the state-

[3] The statement was executed in Chinese. The original Chinese statement also stated that Hsieh's son did not recall that Hsieh had worked as a cook "in the past". The translation inaccurately substituted "before she went to the United States" for the phrase "in the past". There is no indication the translation was seen by Hsieh's son or approved. Hsieh's son executed a second affidavit in which he stated: "The respected employee of the (U.S.) consulate asked me about my mother's prior working circumstances in Taiwan. Since at the time we were all very young, I really did not know anything about my mother's real employment. I only remembered that my mother would ride a pedicab every day to deliver pupils to school, but did not bring them back from school. Since local restaurant working hours do not usually commence until after 10:00 a.m., there was no conflict with my mother's work. Since at the time my family was poor, and my father was sick in bed for many years, our entire household depended upon my mother, a single individual, for sustenance. Because of this, she used the early morning hours for additional work, but this was not her principal job.

"Prior to my mother going to the United States, she was in the Kwok Kong Restaurant working as a cook and had several years' work experience there. At the time I went to the consulate I told this to the gentleman of the consulate, but I do not know whether or not he recorded it."

ment by Hsieh's son, and requesting the Service "to review the Subject's immigration status in view of the attatched [sic]. Embassy TAIPEI believes that Subject obtained her Immigration Status by fraud, and that she is therefore subject to rescission of her immigrant status. Subject's children are presently applying for P2-2 immigrant visas at Taipei. Their visa applications will be held in abeyance pending receipt of INS/NYC notice of final decision." This request was received by the Service on April 9, 1976, and later was finally assigned to Service Investigator Dianne Weisheit.

On August 9, 1976, some four months later, the investigator forwarded a letter to Hsieh and her attorney, requesting her to contact the investigator to arrange a convenient time for an interview with respect to the visa petitions submitted for her children. This interview was subsequently scheduled for August 25, 1976.

On August 25, 1976, Hsieh appeared at the Service's New York office, accompanied by her present counsel, for the interview with Investigator Weisheit. Investigator Weisheit indicated that the purpose of the interview was to take a statement in regard to Hsieh's work experience in Taiwan and in the United States. As instructed by the Service by letter, Hsieh brought her W-2 forms for 1974 and 1975, indicating her employment as a cook in a Chinese restaurant, and the death certificate of her husband. Miss Weisheit asked numerous questions regarding Hsieh's prior employment in Taiwan and the employment of her deceased husband. Hsieh indicated that she originally learned her skill as a Chinese chef in a Chinese restaurant in Taiwan more than ten years previously and she worked in this restaurant, the Kuo-Bin, for over one year. In addition, after that job, she stated she had worked at the Kwok Kong Restaurant for the time specified in the labor certification. At the

same time, Hsieh stated she was also employed as a pedicab driver, driving children to school prior to the opening of the restaurant for business.

Hsieh testified that the reason she held two jobs was because her husband was seriously ill and unable to work and she was the only source of income for the family. She indicated that one of her reasons for coming to the United States was to upgrade the financial status of her family which had deteriorated during her husband's long illness, and that, in fact, while she was in the United States, her husband died in Taiwan.

During the course of the interview several disputes arose in regard to the translation of the Mandarin interpreter of Hsieh's words into English, as Hsieh speaks no English, and her present counsel is fluent in Mandarin Chinese, and as to the relevancy of several questions. The Service investigator terminated the interview under the following circumstances, according to her "Memorandum to file" dated August 25, 1976 (C.A. App. A-108):

> "I then asked the alien what her husband had done in Taiwan. The attorney questioned the relevance of the question. I informed him that it was my job to ask questions and determine their relevance, not his. He continued to object and I told him that he could not answer for his client and that if he did not cooperate, I would not continue the interview. I added he could advise his client not to answer.
>
> "When I asked the alien if she had ever worked as a pedicab driver in Taiwan, she replied in the affirmative. I then asked her when she did this work. Mr. Buxbaum once again interrupted and began challenging the question, stating it was irrelevant. I told him it was not irrelevant, since the investigation was predicated upon her having worked as a driver rather than a chef. He continued to complain. In the meantime the alien kept stating, 'My husband was sick, my husband was sick', and the attorney was trying to quiet her. I informed him that the interview was terminated because of his unreasonable conduct."

While Hsieh's counsel objected to several questions, at no time did he instruct her not to answer, and in fact, Hsieh answered every question asked.

On August 27, 1976, an action was started in the United States District Court, Southern District of New York, by service of a summons and complaint. The action sought a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. § 2201, stating that Hsieh's children were eligible for adjustment of status or immigrant visas, or in the alternative, an order directing the INS to complete its investigation and furnish its report immediately to the American Embassy in Taiwan. Hsieh also obtained an order from the Honorable Inzer B. Wyatt, United States District Court Judge for the Southern District of New York, requiring that the Service show cause on September 3, 1976 "why they should not be ordered to respond immediately to inquiries from the American Embassy in Taiwan regarding the application for permanent residence of the plaintiff's children, respond to letters sent to them by the plaintiff's attorney, cease their unreasonable and inordinate delaying of the application for permanent residence of the plaintiff's children, and cease their harassment of the plaintiff."

A hearing was held before Judge Wyatt on September 3, 1976, at the conclusion of which Hsieh's motion was denied "as without merit including that relief is asked which is just not appropriate for a court to afford."

Despite the plaintiff's attempts on several occasions to obtain a default judgment, and despite pretrial orders, the defendants were not required to answer plaintiff's complaint until April 7, 1977, approximately eight months after the action was commenced.[4] By Notice of Motion dated May 18, 1977, the defendant moved pursuant to Rules 12 (b)(6) and 16, Federal Rules of Civil Procedure, for an order dismissing the action on the ground that the court lacked subject matter jurisdiction. By notice of cross-motion dated June 3. 1977, the plaintiff cross-moved for summary judgment, pursuant to Rules 56 and 12(b) and (c) on the grounds that there were no substantial issues of fact in dispute, and requesting that a writ of mandamus issue requiring the Service to respond to the inquiry of the United States Consul.

By order dated August 26, 1977, Lloyd F. MacMahon, Judge, Southern District of New York, denied plaintiff's motion for summary judgment and granted defendants' motion to dismiss the complaint. In its opinion dismissing the action, the court found that it had subject matter jurisdiction pursuant to 28 U.S.C. § 1331a (as amended), and that the INS was under a duty to plaintiff Hsieh, imposed by statute, to complete an investigation into Hsieh's immigration history in a reasonable manner.

However, the defendants' motion to dismiss was granted on the basis that the Immigration and Naturalization Service of the United States Department of Justice had not "abused its discretion or acted arbitrarily, unreasonably or illegally in light of INS' response that it is conducting the

[4] Apparently on advice of counsel, the Service noticed petitioner for a second interview in May, 1977, *nine months* after the original interview was terminated by the Service and over a year and a half after the original request by the Consulate in Taiwan. As the matter was before the District Court, Hsieh did not attend this interview.

investigation as rapidly as possible considering the low priority given to such investigations and the other prior investigative responsibilites of INS.[5] Nor can we find any basis under all of the circumstances supporting plaintiff's claim that INS is harassing her." (App. B., *infra*, pp. 24a-25a.)

By Notice of Appeal dated September 1, 1977, Wan Shih Hsieh appealed the order of the District Court to the United States Court of Appeals for the Second Circuit.

By decision dated January 12, 1978, the Court of Appeals affirmed the order of the Southern District of New York, dismissing the complaint. However, that Court held that the Service had no duty to conduct or complete an investigation requested by the State Department for the purpose of determining whether visas should be issued to aliens in foreign countries by the State Department pursuant to § 104 of the Act, and that therefore the federal courts had no jurisdiction to review any action by the Service in this area. (App. A, *infra*, pp. 9a-10a.)

A petition for rehearing and suggestion for rehearing *en banc* was denied by the court by order dated February 27, 1978. (App. D, *infra*, pp. 32a-33a.)

Reasons for Granting the Writ

This case presents important questions concerning the duty of the INS to respond to inquiries of American Consulates abroad in connection with the processing of visas in light of the Immigration and Nationality Act's mandate that the INS and State Department maintain "direct and

[5] An affidavit executed by Investigator Dianne Weisheit, submitted in opposition to plaintiff's motion for summary judgment, appears to have been the basis for this finding.

continuous liaison" for the purpose of the efficient administration of the Immigration and Nationality Act. The question is whether, as the Court of Appeals ruled, the Service has absolutely no duty to respond to the inquiries of American Consulates abroad, thereby sanctioning an immovable impediment to the efficient administration of the Act and further sanctioning a non-reviewable, potentially capricious halting of the immigrant visa process for any given alien. The case also presents the related question whether the Service acted reasonably as a matter of law in its failure to respond to the inquiries of the American Consulate in Taiwan.

The petitioner submits that the District Court correctly ruled that the Service owes petitioner a duty to conduct and complete the investigation as requested by the American Consulate in Taiwan, in a reasonable manner.

The duty to respond to the requests of the State Department made through a foreign consulate arises from (1) a specific statutory mandate requiring close cooperation between the Justice Department (the Service) and the State Department (Consulates abroad), (2) the general statutory and regulatory scheme of the Act which contemplates a "continuous liaison" between the two agencies both generally and specifically in innumerable critical aspects, and (3) the specific statutes and regulations applicable to petitioner's case.

Petitioner submits that the decision of the Court of Appeals in holding that the Immigration and Naturalization Service of the Department of Justice has no duty to respond to an inquiry from a United States Consulate abroad is a precursor to the complete dismantling of the statutory scheme requiring continuous liaison between the Department of Justice and the Department of State, and a

clear thwarting of the will of Congress as expressed in the Act.

Petitioner agrees with the conclusion of the District Court with respect to the Service's duty, but submits that this duty is implicit in the architecture of the entire Act and strongly evidenced by numerous specific examples of statutorily mandated interagency cooperation in the visa issuing process. This duty is indigenous to the complementary distribution of functions between the State Department and the Attorney General which marks the Act and very nature of the functions delegated which involve issues of internal security as well as international diplomacy.

The Act provides for no gaps in power between the two agencies, as is amply borne out by the following excerpt from its Legislative History:

> "Section 105 is intended to strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States."[6]

The Legislative History thus reveals that Congress contemplated a complete interfacing between the State Department and the Justice Department. From a practical standpoint this was made possible by numerous specific mandates which require the shuttling of information, recommendations and documents both to and from the respec-

[6] 1952 U.S. Code Cong. and Adm. News, p. 1688. Although this excerpt specifically references the purpose of security screening served by the close interaction of these two government agencies, the excerpt is also relevant to the second sentence of Sec. 1105 which refers to the need for a coordinated uniform and efficient administration of all immigration and nationality laws.

tive agencies all in fulfillment of the umbrella section which explicitly mandates mutual cooperation lest the entire immigration process grind to a halt.

Clearly, each aspect of every contingency which arises in the complex immigrant visa issuing process could not be provided for by statute with respect to inter-agency cooperation. The Second Circuit's opinion, however, erodes the bedrock of the Act by stating that this present example is somehow separate and apart from the cooperation between the agencies envisioned by Congress.

Section 105 of the Act requires that the Justice and State Department "shall maintain direct and continuous liaison with each other with a view to a coordinated, uniform and efficient administration of this Act, and all other immigration and nationality laws." 8 U.S.C. § 1105.[7]

The umbrella section imposes the duty to maintain a continuous liaison with the State Department and upon the "Commissioner", namely, the Commissioner of the Service who acts as the principal arm of the Attorney General with respect to the administration of the Act. *See*, Section 101a(8), 8 U.S.C. § 1101a(8).

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[7] The entire section provides as follows:

LIAISON WITH INTERNAL SECURITY OFFICERS

Sec. 105. The Commissioner and the Assistant Secretary for Consular Affairs shall maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information for use in enforcing the provisions of this Act in the interest of the internal security of the United States. The Commissioner and the Assistant Secretary of State for Consular Affairs shall maintain direct and continuous liaison with each other with a view to a coordinated, uniform, and efficient administration of this Act, and all other immigration and nationality laws. As amended, Section 109(b), Act of August 17, 1977, P.L. 95-105, 91 Stat. 846.

The Service's Commissioner is "charged with any and all responsibilities and authority in the administration of the Service and of [the] Act which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General." Section 103(b), 8 U.S.C. 1103(b).

Similarly, the umbrella section (8 U.S.C. § 1105) imposes the duty to maintain a continuous liaison with the Justice Department upon the Assistant Secretary of State for Consular Affairs, an officer of the State Department "charged with any and all responsibility and authority in the administration of the Bureau (of Consular Affairs) and of the (Immigration and Nationality) Act which are conferred on the Secretary of State as may be delegated to him by the Secretary of State or which may be prescribed by the Secretary of State." Section 104(b), 8 U.S.C. §1104 (b).[8]

Thus, a "*direct and continuous liaison*" for the purpose of a "coordinated, uniform and efficient administration" of the Immigration and Nationality laws is explicitly provided for in mandatory language between two upper echelon officials upon whom the entire power to administer the Immigration and Nationality laws has been delegated.

Actualizing this explicit policy are various provisions of the Act and innumerable regulations of the Immigration and Naturalization Service and the State Department.

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[8] Prior to the amendment made by Sec. 109(b), Act of Aug. 17, 1977, P.L. 95-105, 91 Stat. 846, the term "administrator" was utilized instead of "Assistant Secretary of State for Consular Affairs." The power assigned to the position was unaffected by the change in nomenclature. Section 101 (a) (1) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(1), as amended by P.L. 95-105, now provides that, as used in the Act, "the term 'administrator' means the Assistant Secretary of State for Consular Affairs."

Section 203 of the Act, 8 U.S.C. 1153, provides for allocation of immigrant visas under a preference system to aliens who have specified relationships with United States citizens or lawful permanent residents. Section 204 of the Act, 8 U.S.C. 1154, provides that a citizen of the United States, or a lawful permanent resident, claiming that an alien is entitled to a preference status by reason of a relationship described in Section 203(a) "may file a petition with the Attorney General for such classification".

Further, "after an investigation of the facts in each case . . . the attorney general shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for a preference status under Section 203(a), approve the petition and *forward one copy thereof* to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status."

If the Attorney General should later decide to revoke the approval of a petition for "good and sufficient cause . . .", the revocation is ineffective unless both served upon the petitioner, and *communicated through the Secretary of State* to the beneficiary of the petition. . . ." Section 205, I & N Act, 8 U.S.C. 1155.

The State Department and INS regulations in regard to the approval and revocation of preference visa petitions for intending immigrants further underscore the close interfacing between the two agencies which is required for the efficient administration of the Immigration and Nationality laws.

Under 8 C.F.R. Section 204.3, the INS has a duty to forward an approved petition to the Consulate designated by a petitioner if the beneficiary of an approved petition applies for a visa: "the approved petition *shall be forwarded* to the Consulate. . . ." Under 22 C.F.R. 42.40, consular officers are authorized by the Secretary of State to grant immediate relative or preference status "upon receipt of a petition filed with and approved by the I&NS." In fact, as stated in 22 C.F.R. 42.42, "No alien shall be issued a visa as a preference immigrant unless the consular officer has received from the Immigration and Naturalization Service a petition filed and approved in accordance with Section 204 of the Act."

In regard to the revocation of a preference petition, 22 C.F.R. 42.43 "provides that a consular officer who has reason to believe that the approval of a visa petition was obtained by fraud, misrepresentation or other unlawful means, shall suspend action . . . and *shall return the petition with a report of the facts in the case, for reconsideration by the Service. . . .*"

In return, under 8 C.F.R. § 205.2, the INS is authorized to revoke the approval of a preference petition if the propriety of such revocation "is brought to the attention of the Service, including requests for revocation on reconsideration made by consular officers." Finally, if the INS determines that the petition should be revoked, "the consular office having jurisdiction over the visa application *shall be notified of the revocation.*" 8 C.F.R. § 205.3.

These sections of the regulations were meant to provide for a smooth and efficient operating system and contemplate that the INS will, upon request, conduct an investigation into the circumstances surrounding a visa preference petition and report the results of its investigation to the consul abroad. To find that the Service is not under a statutory duty to conduct such investigations when requested to do so by the consul, is to reach an absurd and unintended result, as was correctly realized by the District Court:

> "Moreover, we think the position that INS is under no duty to conduct such investigations is inequitable and unreasonable. The visas cannot be obtained until the preference petitions are approved, and the preference petitions will not be approved until the investigation is completed. If INS is under no duty to complete the investigation, then plaintiff is left in an administrative limbo. The regulations cannot be read to permit such an administrative Catch-22." (App. B, *infra,* p. 21a.)

It can therefore be clearly seen that cooperation between the INS and the State Department in the according of preference status by visa petition is provided for by statute.

The statutorily mandated cooperation does not end when the INS has determined that a preference status should be granted under section 203 of the Act, however, as was erroneously held by the Court of Appeals. As has just been demonstrated, the duty to maintain direct liaison *continues* throughout the visa issuing process.

Such mandatory statutory cooperation is evidenced by innumerable statutory and regulatory references. Sections 212h and 212i of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and (i), respectively, provide that aliens applying for admission as immigrants to the United States, who are inadmissible for various statutory reasons, may be granted a visa and admitted to the United States if they are the spouse, parent or child of a United States citizen, or a lawful permanent resident, and if in addition, the Attorney General, "in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States."

The State Department and Immigration and Naturalization Service regulations promulgated under this section of

the Act *clearly* envision close cooperation between the two agencies in the procedure whereby waivers of inadmissibility are granted. The entire statutory mechanism would be wholly ineffectual absent such cooperation.

8 C.F.R. § 212.7(a) states that an applicant for immigrant visa seeking a waiver under Section 212(h) or (i) of the Act "shall file an application . . . at the consular office considering the application for a visa. Upon a determination by the consular office that the alien is admissible except for the grounds for which a waiver is sought, the (application) is transmitted to the Service for decision. . . ."

22 C.F.R. § 42.91 provides that for those aliens who are ineligible to receive immigrant visas under the various parts of Section 212 here in question: "a visa shall not be issued to such an alien until the consular officer has received notification from the Immigration and Naturalization Service of the approval of the alien's application for the benefits of Section 212(h) (or section 212(i)) of the Act."

It is therefore abundantly clear that in processing applications for waiver under Section 212(h) or (i), the Service has a clear statutory duty to process applications for waivers transmitted to it by a consular office, and to forward the results of its adjudication back to the consul. Unless the Service acts on the applications, a visa cannot be issued by the consular office abroad.

Other sections which further illustrate the intimate connection of the Service and the State Department are: Section 212(d)(3), 8 U.S.C. 1182(d)(3) [Attorney General given discretion to temporarily admit nonimmigrants (otherwise ineligible) if Attorney General approves recommendation of the State Department for such admission, *see,* 8 C.F.R. § 212]; Section 213, 8 U.S.C. 1183 [Attorney General given discretion to accept bonds on behalf of

aliens excludible to the United States as likely to become a public charge or because of physical disability. Under 8 C.F.R. 213.1, INS authorized to act upon receipt of a request by a consular officer, and required to notify consular officer of its decision prior to issuance of immigrant visa to the alien by consular officer]; Section 212(e), 8 U.S.C. 1182(e) [Foreign medical graduates admitted to the United States under Section 101(a)(15)J may be granted waivers of the two-year foreign residency requirement by the Attorney General upon the favorable recommendation of the Secretary of State pursuant to the request of an interested United States Government agency, or of the Commissioner of the INS after he has determined that departure from the United States would impose exceptional hardship upon certain United States citizens or lawful permanent resident relatives of the alien. 22 C.F.R. Section 42.41(c) provides that such an alien may not receive immigrant visa unless "the foreign residence requirement of Section 212(e) of the Act has been waived by the Attorney General in his behalf."]; 8 C.F.R. Sections 108.1 and 108.2 [on applications for asylum, the District Director of INS "shall request the views of the Department of State before making his decision unless in his opinion the application is clearly meritorious or clearly lacking in substance. . . . If an application is denied for the reason that it is clearly lacking in substance, notification shall be given to the Department of State, with opportunity to supply a statement containing matter favorable to the application and departure shall not be enforced until 30 days following the date of notification unless a reply has been received from the Department of State prior to that time. . . ."].

Sustaining the decision of the Court of Appeals in this case will place petitioner in the "administrative limbo" described in the opinion of the District Court, an unintended result of a set of statutes and regulations designed to promote an efficient and *coordinated* administration of the Immigration and Nationality laws.

The United States Consulate in Taiwan has advised both Hsieh and the Service that it will take no further action in processing the visa applications of Hsieh's children until an investigation is conducted by the Service into Hsieh's immigration history, and the Consulate is informed of the results of that investigation by the Service. As of the present date, the Service has made no reply to that consular inquiry. It is clear that the visa issuing process has been permanently disrupted unless the Service responds.

The Court of Appeals has now held that the Service is under no duty to conduct an investigation for the purpose of determining whether visas should be issued to aliens in foreign countries, specifically Hsieh's children, by the State Department pursuant to Section 104. Whether the Service determines to pursue the question of Hsieh's immigration history is, according to the Court of Appeals, a matter solely within the Service's discretion. Therefore the consul is left powerless to determine the eligibility of Hsieh's children for immigrant visas, creating a statutory gap, an inequitable, unreasonable and unintended result, as found by the District Court.

Further, holding that the Service is under no duty to act, even if the consul is thereby rendered incapable of issuing immigrant visas, violates one of the clear statutory purposes of the Act, the reuniting of families.[9] Hsieh has been

[9] "The legislative history of the Imigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal

(footnote continued on following page)

separated from her fatherless children for more than twelve (12) years, and for more than three (3) years since the visa petitions she filed on their behalf were approved on April 9, 1975. She has now been left without any expectation of rejoining them in the near future.

If allowed to stand, the decision of the Court of Appeals that the Service's duty to act in cooperation with the State Department ends with the approval and transmittal of a preference petition, when construed literally, sanctions the estrangement of United States citizens and lawful permanent residents in the United States from their relatives abroad for indefinite periods because some action required of the Service before the Consul can issue a visa falls into the statutory "no-man's land" envisioned by the District Court by investing total and unbridled discretion in the Service to ignore requests for cooperation from American Consulates abroad.

(footnote continued from preceding page)

treatment of children and was concerned with the problem of *keeping families of United States citizens and immigrants united.*" H.R. Rep. No. 1198, 85th Congress, 1st Sess., p. 7 (1957). *See, also,* H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 29 (1952), U.S. Code Cong. and Admin. News 1952, pp. 1653, 1680 (statute implements "the underlying intention of our immigration laws regarding the *preservation of the family unit*"; 103 Cong. Rec. 15497 (1957) (remarks of Senator Pature) ("This bill is praiseworthy in its fundamental purpose—*to reunite families.*"); *Immigration Service* v. *Errico*, 385 U.S. 214, 220 (1966) ("The intent of the Act is plainly to . . . [*keep*] *family units together.*"); *Fiallo* v. *Levi*, 406 F.Supp. 162, 171 (E.D.N.Y. 1975) (dissenting opinion) ("The legislative history and the statutory scheme leaves no doubt that the exclusive purpose of Congress was to *maintain or reunite family units which include* United States citizen or permanent resident members. . . ."); *Fiallo* v. *Bell*, 97 S.Ct. 1473, n.6 (1977). (Emphasis supplied.)

"To accomodate this goal Congress has accorded a special 'preference status' to certain aliens who share relationships with citizens or *permanent resident aliens.*" *Fiallo* v. *Bell*, 97 S.Ct. 1473,n.6 (1977). (Emphasis supplied.)

Petitioner submits that such a result flies in the face of the language of Section 1105, presaging the dismantling of the entire congressionally-mandated, coordinated, uniform and efficient scheme pursuant to which thousands of immigrants are admitted into the United States yearly.

Petitioner further submits that the District Court, having found that the Service owed a duty to respond in a reasonable manner to the request of the Consulate abroad, was precluded by the sparse state of the record from the additional finding that the Service had indeed acted "reasonably".

The Service alleged, using as its sole basis the affidavit of Service Investigator Dianne Weisheit, that an application for immigration benefits submitted on behalf of an alien residing abroad is always assigned the lowest priority by the Service, thereby rendering any delay by the Service in conducting an investigation on behalf of Hsieh's children necessarily reasonable.

However, the critical issue of the priority assigned to such investigations was left virtually unilluminated by the record, let alone established "beyond doubt", as was any possible rationale for such priority.[10] The finding of reasonableness was thus purely speculative and despite the fact that petitioner disputed the facts alleged.

The record was devoid of any proof as to the alleged fact of a lower priority (or any priority) assigned to investigation requests involving applications submitted to Consulates abroad (as opposed to those involving applications for immigration benefits submitted on behalf of aliens

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[10] The granting of a motion to dismiss pivots on "whether it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,'" *Haines* v. *Kerner*, 404 U.S. 519 (1972); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1956).

within the United States) and equally devoid of any official reasons for such alleged priority.[11]

The District Court thus plainly erred in finding that the petitioner could prove no set of facts in support of her well-plead claim of unreasonableness when she repeatedly alleged and documented that the Service failed to act *at all* in response to the Consulate's inquiries. (C.A. App. A-1, A-29) In its simplest terms, the District Court found on the one hand that the Service had a duty to act but nonetheless ruled that alleging that the Service had indeed failed to so act somehow did not state a cause of action or even show any set of facts sufficient to sustain its cause of action. The illogic is plain.

The record on the Service's behalf consisted of the affidavit of a low level Service employee to whom the responsibility for investigating petitioner's particular case was delegated or who volunteered to investigate the case. (C.A. App. A-4) Her affidavit in this respect is unclear, as will appear. The Service Investigator's affidavit was styled, "Affidavit in Opposition to Motion for Summary Judgment", and provided in pertinent part as follows:

> "On occasion, when consistent with my schedule and the Service's priority system, I have also investigated allegations of fraud involving applications submitted to consuls outside the United States where the consul requests an investigation and the approval of the application depends on the continued viability of the immigration status of an individual in this country. Plaintiff's action concerns this type of lower priority investigation. (The lower priority

[11] Similarly, as petitioner submits that respondent's motion to dismiss should more properly have been ruled upon as a motion for summary judgment, these same issues constituted "genuine issues of material fact" left in dispute. *See*, n.13, *infra*.

> results because aliens outside the United States have no absolute right to enter this country and therefore cannot suffer a substantial hardship if they are forced to wait additional time for the privilege of immigrating here, and because the Service is under no statutory or regulatory obligation to conduct investigations of this type.)"

The District Court construed these allegations as follows:

> "Defendant *purportedly* assigns lower priority to investigation requests involving applications submitted on behalf of aliens within the United States because aliens outside the United States, having no absolute right to enter this country, cannot suffer a substantial hardship by being forced to wait additional time for the privilege of immigrating here." (Emphasis supplied.)

It is thus beyond peradventure that the District Court's own finding that any alleged priority was never proven but only alleged or "*purported*" to exist precluded the finding that the Service had established beyond doubt that it had acted reasonably. The first factor to be established in any finding of reasonableness must of necessity be what priority the Service has attached to the investigations. This initial inquiry was never undertaken by the District Court. The further inquiry as to the justifications of that inquiry as cursorily referenced by one low level employee of the Service patently fails to suffice in this respect. They are, in any event, startling in asserting that no "hardship" can exist, as no "absolute right" to enter the country exists. If such rationalizations suffice for judicious exercise of agency discretion then no alien is ever entitled to any consideration with respect to any immigration law benefit because the "absolute right" to enter the country does not exist. Moreover, its contents cannot, as an evidentiary

matter, stand for the policy of the Service with respect to the investigations in question. The assertion that the record fails to establish "beyond doubt" the reasonableness of the Service's actions with respect to petitioner is therefore left unimpeached.

Petitioner's point is underscored by the District Court's improvident treatment of the respondent's motion as a 12(b) motion for dismissal instead of a Rule 56 motion for summary judgment.[12] As the "reasonableness" of the Service's actions was not even colorably established "beyond doubt", critical "genuine issues of material fact" remained totally unresolved.

To the extent that the respondent would have referred to its own affidavits, it is well-settled that this automatically transforms a 12(b)(6) motion into a Rule 56 motion for summary judgment in accordance with the mandatory language of 12(b), language given literal construction. *Carter* v. *Stanton*, 405 U.S. 669, 671 (1972); *Freeman* v. *Marine Midland Bank-New York*, 494 F.2d 1334, 1338-1339 (2d Cir. 1974); *Pirone* v. *Flemming*, 278 F.2d 508 (2d Cir. 1960); *Martin* v. *Johnson*, 471 F.2d 704, 705 (6th Cir. 1973).

Similarly, where the court's ruling on a motion to dismiss is in reliance on matters outside the pleading, the better practice is to treat the motion as one for summary judgment. *Barrett* v. *United Hospital, et al.*, 376 F.Supp. 791, 795 (S.D.N.Y. 1974).

Moreover, where the movant's legal position necessarily relies on matters not yet before the Court, the motion to

[12] Summary judgment is ruled upon from the entire record, the standard being whether genuine issues of material fact remain upon review of the record in a light most favorable to non-movant. *United States* v. *Diebold Inc.*, 369 U.S. 654, 659 (1962); *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962).

dismiss must be denied. *Schwartz* v. *Commonwealth Land Title Insurance Co.*, 374 F.Supp. 564, 578-579 (E.D.Pa. 1974).

In the instant case, the Service's version of its efforts to respond to the inquiries of the American Consulate was provided by the Affidavit in Opposition to Petitioner's Motion for Summary Judgment and which affidavit was disputed point by point by petitioner's affidavits in support of her motion for injunctive relief and summary judgment.

It follows that the District Court was compelled to treat the respondent's motion as that for summary judgment, as any finding of reasonableness must per force have been based on the affidavit of the Service. Rule 12(b), Fed. R. Civ. P. It follows equally as forcefully that the District Court could not have ruled that all genuine issues of material facts were resolved for the very same reasons that the Service failed to establish "beyond doubt" that their actions were "reasonable", namely, that the Service priority policy was not established nor were its reasons set forth in an evidentiarily cognizable manner.[13] (The low level employee whose affidavit was submitted was obviously incompetent to present evidence as to Service policy. No Service documents as to such policy were offered.)[14]

Moreover, the reasonableness of the Service's actions must depend on a myriad of factors nowhere developed

[13] It is of course not suggested that every complaint capable of withstanding a motion to dismiss automatically can withstand a motion for summary judgment. The instant record, however, is so sparse as to the critical facts as to render that result applicable herein.

[14] Although no evidence of a priority system apart from the referenced affidavits was mentioned by the District Court, the Federal Register Act provides that "the contents of the Federal Register shall be judicially noticed." 44 U.S.C. § 307. No such priority systems are known to petitioner's counsel to have ever appeared in the Federal Register.

on the record, namely, the number of such inquiries handled by the Service each year, the methods, if any, established to handle them, the nature of those inquiries which have higher priority and so forth.

CONCLUSION

The petition for a writ of certiorari should be granted.

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May 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 439---September Term 1977
(Argued: December 5, 1977
Decided: January 12, 1978)
Docket No. 77-6144

WAN SHIH HSIEH, Plaintiff-Appellant

- against -

MAURICE F. KILEY, District Director, Immigration and Naturalization Service, United States Department of Justice,

Defendant-Appellee.

Before: LUMBARD, SMITH and MANSFIELD, Circuit Judges.

Appeal from an order of the Southern District of New York, Lloyd F. MacMahon, Judge, dismissing a complaint by a permanent resident alien of Chinese origin seeking an order directing the Immigration and Naturalization Service to complete

an investigation requested by the United States Consul into whether appellant's status had been acquired through fraud and ordering the Consul to issue immigration visas to appellant's children in Taiwan.

Affirmed.

MANSFIELD, Circuit Judge:

Wan Shih Hsieh, a permanent resident alien of Chinese origin, appeals from an order of the Southern District of New York, Lloyd F. MacMahon, Judge, dismissing her complaint, which purports to invoke federal jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq., and Administrative Procedure Act, 5 U.S.C. §§ 701, et seq., seeking an order directing the Immigration and Naturalization Service ("INS") to pursue and complete an investigation requested of it by the United States Consul in Taiwan into the question of whether her permanent resident status should be rescinded pursuant to § 246(a) of the Immigration and Nationality Act (the "Act") on the ground that it had been acquired through fraud. 8 U.S.C. § 1256(a). We affirm, but with clarification as to the INS's investigative duties in the

matter, in view of the district court's opinion on this subject.

Appellant, a native and citizen of Taiwan, was in 1966 admitted into the United States as a non-immigrant, leaving her husband and three children in Taiwan. In February, 1973, appellant invested $7,000 in the Hsin Hsin Chinese Restaurant in Brooklyn, becoming a shareholder of the corporation that owns the restaurant. On April 11, 1973, the United States Department of Labor issued a labor certification to the restaurant authorizing employment of appellant as a specialty chef on the basis of her sworn statement that from 1959 through 1966 she had been employed as a chef in the Kwok Kong Restaurant in Taipei City, Taiwan. Armed with this certificate, the Hsin Hsin Restaurant on April 30, 1973, petitioned the INS to qualify appellant as a sixth preference immigrant pursuant to § 203(a)(6) of the Act, 8 U.S.C. § 1153(a)(6), which was approved on August 9, 1973. On November 9, 1973, appellant's status was accordingly adjusted by the INS to that of permanent resident alien, see § 245

of the Act.[1]

Having successfully gained permanent resident status for herself, appellant next sought to assist her children in Taiwan to enter the United States as immigrants by petitioning the INS on their behalf to grant them second preference status under § 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2).[2] On April 9, 1975, the children applied to the United States Consulate in Taiwan for immigrant visas. In reviewing their applications the Consul discovered that appellant's "household register," an official record kept by the Taiwan government of her education, occupation and employment, did not reveal her claimed earlier employment at the Kwok Kong Restaurant in Taipei City, which had been the predicate for her United States labor certification, sixth preference classification, and adjustment of status, which in turn was the predicate for approval of her children's visa applications as second preference immigrants.

Apparently suspecting that appellant's status may have been procured by fraud, the Consul held up issuance of the visas to her children and requested the

INS to forward copies of her adjustment application and to investigate the basis of her adjustment of status and whether she had in fact worked as a chef at the Kwok Kong Restaurant in Taipei City as represented. In the meantime appellant's son executed in Taiwan a sworn statement that his mother had not to his knowledge worked as a chef in Taiwan before going to the United States but had worked as a pedicab driver.

On August 2, 1976, the INS conducted an interview of appellant in which it sought unsuccessfully to elicit information from her regarding her employment as a chef in Taiwan before coming to the United States in 1966. The interview proved a failure, principally because of differences over the accuracy of the interpretation (appellant does not speak English) and objections to the relevancy of questions. On the following day, appellant instituted the present action, claiming unreasonable delay by the INS in its investigation and seeking an order directing the Consul to issue the immigration visas to the children and directing the INS to complete its investigation and furnish its

report immediately to the American Embassy in Taiwan concerning whether appellant had fraudulently obtained her status. In the alternative, appellant sought an order granting the visas to the children and a declaratory judgment that the children are eligible for adjustment of status and that the INS's failure to respond to the Consul and to appellant's petition is illegal. After an initial application for immediate relief was, after hearing, denied by Judge Wyatt, and appellant thereafter failed to comply with pretrial orders issued by the district court, Judge MacMahon, by memorandum opinion dated August 24, 1977, denied plaintiff's motion for summary judgment and granted defendant's motion to dismiss the complaint.

Judge MacMahon held that the federal court lacked jurisdiction to review the Consul's decision and that, although the INS owed a duty to complete within a reasonable time its investigation into possible fraud on appellant's part in obtaining her status as a permanent alien resident (at least insofar as the issue was relevant to her petitions to the INS for preference status for her children as

a basis for their immigration), the INS had not abused its discretion in failing to do so by the time this action was commenced, in view of all of the circumstances, including "the low priority given to such investigations and the other prior investigative responsibilities of INS." From this order Hsieh appeals.

DISCUSSION

The district court correctly held that no jurisdictional basis exists for review of the action of the American Consul in Taiwan suspending or denying the issuance of immigration visas to appellant's children there. It is settled that the judiciary will not interfere with the visa-issuing process. Gomez v. Kissinger, 534 F.2d 519 (2d Cir. 1976); Pena v. Kissinger, 409 F.Supp. 1182, 1185-88 (S.D.N.Y. 1976). In Kleindienst v. Mandel, 408 U.S. 753, 766 (1972), the Supreme Court stated the basic principle:

> "'The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they

> may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.'"

The jurisdiction of federal courts to review the INS's action in conducting or completing an investigation requested by some other branch of the government, such as the State Department, would similarly depend on the existence of a statutory authorization or mandate from Congress. No such authorization is shown or appears to exist. The Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq., cited in appellant's complaint is remedial, not jurisdictional, Schilling v. Rogers, 363 U.S. 666, 677 (1960); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950), and the Administrative Procedure Act, also cited, does not provide subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 105 (1977); Small v. Kiley, ___ F.2d ___ (2d Cir. March 9, 1977), Slip Opin. 2221, 2224 n.1.

Although not referred to as a jurisdictional basis in her complaint, appellant now contends that the district court is empowered to compel the INS to complete its investigation into her immigration status by 28 U.S.C. § 1361, which authorizes district courts to assume jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States. . .to perform a duty owed to the plaintiff." Putting aside the question of whether appellant, in view of the INS's offer to continue its investigation if appellant will cooperate, is eligible to invoke such relief, appellant's contention must be rejected for the reason that the INS is under no duty to conduct an investigation for the purpose of determining whether visas should be issued to aliens in foreign countries by the State Department pursuant to § 104 of the Act, 8 U.S.C. § 1104. The sole duty of the INS in this context was to determine whether appellant's petition for preference status for her children in Taiwan, based on their relationship to her, should be granted under § 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2), see 8 C.F.R. § 204, 22 C.F.R.

§ 42.40. This it has done, approving appellant's preference petition on April 9, 1975.

The investigation which appellant seeks to compel the INS to complete in the present action is not directed toward the preference petitions for the children but the question of whether appellant fraudulently acquired her immigration status. Whether the INS pursues this letter inquiry further and, if so, whether it will institute proceedings to rescind her status are matters solely within the INS's discretion, see United States v. Santelises, 476 F.2d 787, 790 (2d Cir. 1973); United States ex rel. Mascucci v. Follette, 272 F.Supp. 563, 565 (S.D.N.Y. 1967), and hence are not reviewable under the Administrative Procedure Act or 28 U.S.C. § 1361. Moreover, the INS has five years from the date when appellant acquired her permanent resident status within which to institute rescission proceedings. Zaoutis v. Kiley, 558 F.2d 1096 (2d Cir. 1977). In short, neither the children's application for admission into the United States as immigrants nor the Consul's request to the INS create a duty on the part of the INS to appellant to

investigate whether rescission proceedings should be instituted, much less to complete any such investigation within a shorter period than that provided by § 246(a) of the Act, 8 U.S.C. § 1256(a). Aside from our powerlessness to intervene, the judicial creation of such a duty would have the potential for mischievous interference with the functioning of already overburdened administrative agencies.

In stating in its opinion that the INS had a duty under 8 C.F.R. § 205 and 22 C.F.R. § 42.43 to conduct and complete the investigation requested by the Consulate, the district court appears to have confused the INS's duty to act on preference petitions, which are concerned solely with the family relationship between the parties, with the question of whether the INS must investigate alleged fraud in obtaining a permanent resident status. These matters are entirely separate and distinct. Since there is no question as to the parent-child relationship between appellant and her children in Taiwan, the preference petitions were approved by the INS on April 9, 1975. The INS's duty in the matter ended there. To the extent

that the district court's opinion states that the INS is under a further duty to investigate a fraudulently-obtained preference status it is vacated.

The order of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WAN SHIH HSIEH, Plaintiff

- against -

MAURICE F. KILEY, District Director and IMMIGRANTION [sic] AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

Civil Action No. 76 Civ. 3837 (LFM)

MEMORANDUM

MacMAHON, District Judge.

Defendants move to dismiss this action and plaintiff cross-moves for summary judgment.

This controversy stems from the efforts of plaintiff, a resident alien, to have immigrant visas issued to her three children who reside in Taiwan, Republic of China.

Plaintiff entered the United States on September 20, 1966 and became a permanent resident alien on November 9, 1973. The adjustment of her status to a permanent resident alien was based in part on the approval of a petition granting her sixth preference status pursuant to Section 203(a)(6) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(a)(6), which confers priority in the allocation of immigrant visas on qualified immigrants who are capable of performing specified types of labor for which a shortage of persons exists within the United States.

Thereafter, she filed petitions with the Immigration and Naturalization Service ("INS") seeking second preference status for her children pursuant to Section 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2), conferring priority on the unmarried children of a lawfully admitted resident alien in the allocation of immigrant visas. Based on INS approval of their preference status on April 9, 1975, the children applied to the Consul for immigrant visas on July 15, 1975.

In processing the children's visa applications, the Consul discovered that plaintiff may have obtained her resident alien status fraudulently by misrepresenting her former employment in Taiwan. The Consul suspended action on the children's visa applications pending an investigation of the alleged fraud and recommendation by INS concerning the institution of proceedings to rescind plaintiff's resident alien status. See Section 246 of the Act, 8 U.S.C. § 1256. The rescission of that status would, of course, preclude plaintiff's conferral of immigration benefits on her children.

Although INS received the Consul's request in September 1975, the matter was not assigned for investigation until May 1976. INS contends this substantial delay was due to the low priority assigned to investigation requests involving alleged fraud in applications submitted to Consuls abroad.[1]

Plaintiff instituted this action on August 27, 1976 after sending two letters of inquiry to INS concerning her children's visa applications and after an interview on August 25, 1976, which was

terminated by the INS investigator due to alleged disruptive influence of plaintiff's attorney. Plaintiff, in essence, seeks a writ of mandamus, pursuant to 28 U.S.C. § 1361, or a mandatory injunction under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702: (1) ordering the Consul to issue the immigration visas or (2) ordering INS to complete the investigation and furnish the Consul with the requested report which would, if favorable, permit the Consul to issue the visas. Alternatively, she seeks a court order granting visas to her children so that adjustment of their status to permanent resident aliens could take place in the United States. She also seeks a declaratory judgment that her children are eligible for adjustment of status and that the failure of INS to respond to the Consul and to her petition for her children is illegal and arbitrary. Finally, she seeks to enjoin INS from harassing her.

A consular officer is the only official who can issue a visa to aliens seeking admission to this country, see Section 221 of the Act, 8 U.S.C. § 1201, and we lack jurisdiction to review his

decision to deny a visa. See Gomez v. Kissinger, 534 F.2d 518, 519 (2d Cir. 1976); Pena v. Kissinger, 409 F.Supp. 1182, 1186-88 (S.D.N.Y. 1976). Accordingly, we must dismiss plaintiff's complaint insofar as it seeks (1) to have us issue visas; (2) a writ of mandamus or mandatory injunction ordering the Consul to issue the visas; or (3) a declaratory judgment that her children are entitled to visas.

We also dismiss plaintiff's complaint insofar as it seeks a declaratory judgment that her children are eligible for adjustment of status and that the denial thereof is arbitrary and illegal. The Attorney General is authorized to adjust the status of certain nonimmigrant aliens, who were inspected and are presently within the United States, to the status of lawful permanent resident aliens. Section 245 of the Act, 8 U.S.C. § 1255. Since plaintiff's children are not presently within the United States, have not been inspected nor admitted as required by law, and are applying for immigrant visas abroad, they cannot apply for adjustment of status under 8 U.S.C. § 1255 even if they were otherwise eligible for that

extraordinary relief. See Bagamasbad v. Immigration and Naturalization Service, 531 F.2d 111, 114 (3d Cir. 1976).

The rule restricting our appellate jurisdiction, enunciated in Gomez and Pena, supra, does not apply insofar as plaintiff seeks a writ of mandamus or a mandatory injunction directed to INS, and to that extent the matter is open to our review. Before a writ of mandamus may properly issue, however, plaintiff must show (1) that she has a clear right to the relief sought; (2) that there is a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) that no other adequate remedy is available. Lovallo v. Froehlke, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973). Alternatively, mandamus may also be appropriate when official conduct has gone beyond any rational exercise of discretion. See Leonhard v. Mitchell, 473 F.2d 709, 713 (2d Cir.), cert. denied sub nom. Leonhard v. Richardson, 412 U.S. 949 (1973). However, even under the latter test, plaintiff must show that a government official owes her a duty. Id.

INS contends that it owes no duty to plaintiff because there is no application by plaintiff before INS. That contention is factually incorrect. Plaintiff has filed preference status petitions on behalf of her children and it is her alleged fraud as it relates to those petitions that prompted the subject investigation. Moreover, the statutory scheme and the regulations of INS relating to the revocation of preference petitions establish its duty to conduct the investigation. See Feliciano v. Laird, 426 F.2d 424, 427-29 (2d Cir. 1970). INS has a duty under 8 C.F.R. § 204.3 to forward an approved petition to the consulate designated by the petitioner if the beneficiary of an approved petition applies for a visa.[2] Furthermore, under 22 C.F.R. § 42.43(a), a consular officer must suspend action in a preference status petition case and return the petition, with a report of the facts, for reconsideration by INS if he has reason to believe that the approval of the petition was obtained by fraud.[3] INS is authorized by 8 C.F.R. § 205.2 to revoke the approval of a preference status petition if the propriety of such revoca-

tion "is brought to the attention of the Service, including requests for revocation or reconsideration made by consular officers."[4] Finally, 8 C.F.R. § 205.3 provides in part:

> "Revocation of approval of a petition. . .shall be made only upon notice to the petitioner [here plaintiff] who shall be given an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval. If upon reconsideration the approval previously granted is revoked, the petitioner shall be informed of the decision with the reasons therefor and shall have 15 days after the service of the notification of decision within which to appeal as provided in Part 3 of this chapter,[5] if the petition was filed for a preference under paragraph . . .(2). . .of Section

> 203(a) of the Act. . . ."

Plaintiff's petition was filed pursuant to that paragraph.

These sections, read together, obviously contemplate investigation by INS of a fraudulently obtained preference status. They not only provide for referral of petitions to INS for investigation, but also guarantee the petitioner certain procedural rights in revocation proceedings, including the right to offer evidence and to appeal. Moreover, we think the position that INS is under no duty to conduct such investigations in inequitable and unreasonable. The visas cannot be obtained until the preference petitions are approved, and the preference petitions will not be approved until the investigation is completed. If INS is under no duty to complete the investigation, then plaintiff is left in an administrative limbo. The regulations cannot be read to permit such an administrative Catch-22.

Furthermore, the failure of INS to take action regarding preference petitions would constitute a de facto deprivation of plaintiff's right to appeal

bestowed by 8 C.F.R. § 205.3. The contention that INS owes no duty to plaintiff to conduct investigations into the status of permanent resident aliens because no statutes or regulations impose such a duty is disingenuous. Plaintiff's status as a resident alien is relevant in this action only insofar as her alleged fraud in its procurement may form a derivative basis for the revocation of her children's preference status. The above regulations, specifically 8 C.F.R. §§ 205.2, 205.3 and 22 C.F.R. § 42.43, plainly provide for INS investigation in that area.

Failure to conduct an investigation of plaintiff's alleged fraud would not prejudice her if the results of such investigation were to be used solely in possible proceedings to rescind her resident alien status for she could continue to hold that status. The situation is entirely different here, however, where the Consul has suspended action on her children's visa applications pending an investigation of plaintiff's alleged fraud in the procurement of her resident alien status as it relates to the possible revocation of her children's preference status.

Plaintiff is seriously prejudiced because the Consul will not issue the visas until the investigation is completed, and she is deprived of her children in the interim.[6]

Although we have determined that INS does owe a duty to plaintiff to complete the investigation, the discharge of that duty obviously involves considerable discretion. Even though we might hesitate to characterize that duty as "peremptory," see Lovallo v. Froehlke, supra, 468 F.2d at 343, nevertheless, INS is still properly subject to a writ of mandamus if its conduct has gone "far beyond any rational exercise of discretion." Leonhard v. Mitchell, supra, 473 F.2d at 713. See Lovallo v. Froehlke, supra, 469 F.2d at 346; Nixon v. Secretary of the Navy, 422 F.2d 934, 939 (2d Cir. 1970).

Furthermore, the conduct of INS is reviewable under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, entitling a person suffering a legal wrong, or adversely affected or aggrieved by agency action to judicial review.[7] See Pena v. Kissinger, supra, 409 F.2d at 1186, 1187; Rumahorbo v. Secretary of Labor, 390 F.Supp. 208, 209 (D.D.C. 1975). A "legal

wrong" is the invasion of a legally protected right, see Pennsylvania R.R. v. Dillon, 335 F.2d 292, 294 (D.C.Cir.), cert. denied sub nom. American-Hawaiian S.S. Co. v. Dillon, 379 U.S. 945 (1964), or, in other words, the breach of a legal duty owed to the plaintiff. See Black Hotel Co. v. Froehlke, 351 F.Supp. 956, 958 (W.D. Ok. 1972).

We have already determined that INS owes plaintiff a legal duty to complete the investigation, and if INS unlawfully withholds or unreasonably delays the completion of that investigation, then the issuance of a mandatory injunction is proper. See Section 10(e)(1) of the Administrative Procedure Act, 5 U.S.C. § 706(1).

Thus, we are confronted with the identical issue under 28 U.S.C. § 1361 as we are under Sections 10(a) and (e) of the Administrative Procedure Act, i.e., whether INS has abused its discretion in failing to complete the investigation. While plaintiff asserts that the failure of INS to complete the investigation is arbitrary, unreasonable and illegal, we cannot conclude that INS has abused its discretion or acted arbitrarily,

unreasonably or illegally in light of INS' response that it is conducting the investigation as rapidly as possible considering the low priority given to such investigations and the other prior investigative responsibilities of INS. Nor can we find any basis under all of the circumstances supporting plaintiff's claim that INS is harassing her.

Accordingly, we deny plaintiff's motion for summary judgment and grant defendants' motion to dismiss.

So ordered.

Dated: New York, N. Y.
August 26, 1977

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

Wan Shih Hsieh v. Kiley 76 Civ. 3837 (LFM)

FOOTNOTES

1 Defendant purportedly assigns lower priority to investigation requests involving applications submitted to Consuls abroad than to those involving applications for immigration benefits submitted

on behalf of aliens within the United States because aliens outside the United States, having no absolute right to enter this country, cannot suffer a substantial hardship by being forced to wait additional time for the privilege of immigrating here.

2 "§ 204.3 Disposition of approved petitions.

If the beneficiary of an approved petition will apply to an American Consulate for a visa, the approved petition shall be forwarded to the consulate designated by the petitioner.

When the beneficiary of an approved petition will file an application for adjustment of status under section 245 of the Act, the approved petition will be retained by the Service for consideration in connection with that application."

3 "§ 42.43 Suspension or termination of action in petition cases.

(a) Suspension of action. (1) The consular officer shall suspend in a petition case and shall return the petition with a report of the facts in the

case, for reconsideration by the Service if the petitioner requests suspension of action, or if the consular officer knows or has reason to believe that the approval of the petition was obtained by fraud, misrepresentation, or other unlawful means, or that the beneficiary is not entitled, for any other reason, to the status approved.

(2) When a third or sixth preference petition is automatically revoked because of the expiration of the beneficiary's labor certification, the consular officer shall suspend action in the case and shall retain the petition while affording the beneficiary an opportunity to seek revalidation of the labor certification or to obtain a new labor certification.

(b) Termination of action. The consular officer shall terminate action in a petition case upon receipt from the Service of notice of the revocation of the petition or upon a finding that the petition has been automatically revoked pursuant to 8 CFR 205.1(a) or to 8 CFR 205.1(b)(2) through (5)."

4 "§ 205.2 Revocation on notice. The approval of a petition made under section 204 of the Act and in accordance with Part 204 of this chapter may be revoked on any ground other than those specified in § 205.1 by any officer authorized to approve such petition when the propriety of such revocation is brought to the attention of the Service, including requests for revocation or reconsideration made by consular officers."

5 Part 3 establishes procedures governing appeals to the Board of Immigration Appeals.

6 Plaintiff, as a permanent resident alien, is entitled to the full panoply of constitutional protection. See Pena v. Kissinger, supra, 409 F.Supp. at 1187.

7 Although 5 U.S.C. § 702 is not an implied grant of subject matter jurisdiction, we have jurisdiction to review the INS' conduct pursuant to 28 U.S.C. § 1331(a) (as amended). The 1976 amendment to this section eliminated the requirement of a specified amount-in-controversy as a prerequisite to the

maintenance of an action against an agency of the United States, or any officer or employee thereof in his official capacity. See Califano v. Sanders, 45 U.S.L.W. 4209, 4210 (U.S. Feb. 23, 1977).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of January, one thousand nine hundred and seventy-eight.

Present:

HON. J. EDWARD LUMBARD
HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD
Circuit Judges,

Wan Shih Hsieh, Plaintiff-Appellant,

v.

Maurice F. Kiley, District Director and Immigration and Naturalization Service, U. S. Dept. of Justice,

Defendants-Appellees.

Docket No. 77-6144

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the ORDER of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

By /s/ Arthur Heller
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of February, one thousand nine hundred and seventy-eight.

Present:

HON. J. EDWARD LUMBARD
HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD
Circuit Judges.

WAN SHIH HSIEH, Plaintiff-Appellant,

v.

MAURICE F. KILEY, District Director and Immigration and Naturalization Service, U. S. Dept. of Justice,

Defendants-Appellees.

Docket No. 77-6144

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

APPENDIX E

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

I. Statutes

A. Section 101, Immigration and Nationality Act, 8 U.S.C. 1101

SUBCHAPTER I--GENERAL PROVISIONS

§ 1101. Definitions

(a) As used in this chapter--

(1) The term "administrator" means the Assistant Secretary of State for Consular Affairs[1] of the Department of State.

* * *

(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and

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[1] By reason of the amendments made to the Immigration and Nationality Act by Section 109(b), Act of August 17, 1977, P.L. 95-105, Stat. 846, all references in the Act to the terms "administrator" and "Bureau of Security and Consular Affairs" have been replaced by the designations "Assistant Secretary of State for Consular Affairs" and "Bureau of Consular Affairs", respectively.

a Deputy Commissioner of Immigration and Naturalization, respectively.

B. Section 103, Immigration and Nationality Act, 8 U.S.C. 1103

§ 1103. Powers and duties of the Attorney General and Commissioner; appointment of Commissioner

(a) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Deaprtment of State, or diplomatic or consular officers. . .

(b) The Commissioner shall be a citizen of the United States and shall be appointed by the President, by and with the advice and consent of the Senate. He shall be charged with any and all responsibilities and authority in the administration of the Service and of this chapter which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be pre-

scribed by the Attorney General. June 27, 1952, c. 477, Title I, § 103, 66 Stat. 173.

C. Section 104, Immigration and Nationality Act, 8 U.S.C. § 1104.

§ 1104. Secretary of State--Powers and duties

(a) The Secretary of State shall be charged with the administration and the enforcement of the provisions of this chapter and all other immigration and nationality laws relating to (1) the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas; (2) the powers, duties, and functions of the Bureau of Security and Consular Affairs; and (3) the determination of nationality of a person not in the United States.

Creation of Bureau of Security and Consular Affairs; appointment and duties of Administrator

(b) There is established in the

Department of State a Bureau of Security and Consular Affairs, to be headed by an administrator (with an appropriate title to be designated by the Secretary of State), with rank equal to that of an Assistant Secretary of State. He shall be appointed by the President by and with the advice and consent of the Senate. The administrator shall be a citizen of the United States, qualified by experience, and shall maintain close liaison with the appropriate committees of Congress in order that they may be advised regarding the administration of this chapter by consular officers. He shall be charged with any and all responsibility and authority in the administration of the Bureau and of this chapter which are conferred on the Secretary of State as may be delegated to him by the Secretary of State or which may be prescribed by the Secretary of State. He shall also perform such other duties as the Secretary of State may prescribe.

D. Section 105, Immigration and Nationality Act, 8 U.S.C. § 1105.

§ 1105. Liaison with internal security officers

The Commissioner and the Assistant Secretary of State for Consular Affairs shall have authority to maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information for use in enforcing the provisions of this chapter in the interest of the internal security of the United States. The Commissioner and the Assistant Secretary of State for Consular Affairs shall maintain direct and continuous liaison with each other with a view to a coordinated, uniform, and efficient administration of this chapter, and all other immigration and nationality laws.
June 27, 1952, c. 477, Title I, § 105, 66 Stat. 175, as amended, Section 109(b), Act of August 13, 1977, P.L. 95-105, 91 Stat. 846.

II. Federal Rules

Rule 12(b) Federal Rules of Civil Procedure

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses of objections in a responsive pleading or motion. If a

pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

III. Federal Regulations

A. 8 C.F.R. Section 204.3

204.3 Disposition of approved petitions.

If the beneficiary of an approved petition will apply to an American consulate for a visa, the approved petition shall be forwarded to the consulate designated by the petitioner.

When the beneficiary of an approved petition will file an application

for adjustment of status under section 245 of the Act, the approved petition will be retained by the Service for consideration in connection with that application.
(30 F.R. 14775, Nov. 30, 1965)

B. 22 C.F.R. Section 42.42

42.42 Petitions for preference status.

No alien shall be issued a visa as a preference immigrant unless the consular officer has received from the Immigration and Naturalization Service a petition filed and approved in accordance with section 204 of the Act.